STATE OF MICHIGAN

COURT OF APPEALS

WANDA REDMOND, Individually and as Guardian of RASHAAN MIX, Plaintiff-Appellant, v IRVINE NEURO REHABILITATION, L.L.C., Defendant-Appellee.	UNPUBLISHED May 22, 2014 No. 314144 Oakland Circuit Court LC No. 2011-120517-NH

Before: CAVANAGH, P.J., and OWENS and M.J. KELLY, JJ.

PER CURIAM.

Plaintiff, Wanda Redmond, filed a medical malpractice and ordinary negligence action against defendant, Irvine Neuro Rehabilitation, L.L.C., on behalf of Rashaan Mix and herself. Defendant moved for summary disposition, arguing that it was not the proper entity to sue. Plaintiff also applied for leave to amend her complaint to add Irvine Head Injury Homes, Inc. The trial court considered the motions together, granted defendant's motion for summary disposition, and denied plaintiff's motion to amend. Plaintiff appeals as of right. We affirm.

Mix, who suffers from a traumatic brain injury, was a resident patient at home operated by Irvine Head Injury Homes, Inc. Plaintiff filed this action against defendant in July 2011, alleging that Mix was injured on February 26, 2009, while exiting a transport van owned and operated by defendant. Plaintiff alleged that despite knowing that Mix had a history of falls, defendant failed to assist Mix in exiting the vehicle or provide a step or lift, and as a result, he fell and sustained a knee fracture and aggravated his head injury.

Defendant moved for summary disposition in October 2011, arguing, among other things, that it was not the proper defendant to sue because it had not provided services to Mix. Defendant submitted two affidavits of noninvolvement and provided state records showing that it was not in existence until October 22, 2010. Because there was some confusion on plaintiff's part regarding the proper entity to sue, the trial court denied defendant's motion and allowed plaintiff time to check the public records and conduct discovery.

On March 22, 2012, plaintiff moved to amend her complaint to add Irvine Neuro Rehabilitation Center, but the trial court denied the motion for failure to attach a proposed complaint. Plaintiff sought reconsideration, this time seeking to add Irvine Head Injury Homes, Inc. as a defendant. In the meantime, defendant filed a second motion for summary disposition,

again asserting that defendant did not provided any services to Mix. Defendant submitted the deposition of its president, who testified that defendant was formed in 2010 with the intent of building a medical facility in Southfield, but the project fell through. According to its president, defendant never became operational.

After hearing the motions together, the trial court granted defendant's motion for summary disposition and denied plaintiff's motion to amend the complaint. The trial court determined that plaintiff's motion was futile because the statute of limitations for the medical malpractice and negligence claims as to the prospective defendant had expired. The trial court made it clear that plaintiff had notice it filed the lawsuit against the wrong defendant, but waited over a year to correct the mistake, despite being able to ascertain the correct defendant by exercising due diligence.

On appeal, plaintiff argues that the trial court erred by granting defendant's motion for summary disposition and denying her motion to amend her complaint to add a new party. We review de novo a trial court's decision on a motion for summary disposition. *Hoffner v Lanctoe*, 492 Mich 450, 459; 821 NW2d 88 (2012). "A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). In reviewing the motion, this Court considers "the pleadings, admissions, and other evidence submitted by the parties in a light most favorable to the nonmoving party." *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). Summary disposition is properly granted "if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Id.* A genuine issue of material fact exists "when reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving party." *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008). Additionally, we review the denial of a motion for leave to amend a complaint for an abuse of discretion. *Casey v Auto Owners Ins Co*, 273 Mich App 388, 400-401; 729 NW2d 277 (2006).

We first address whether the trial court properly dismissed the case against defendant. To overcome summary disposition in this medical malpractice and negligence action, plaintiff was required to show that defendant owed Mix a duty. *Case v Consumer Power Co.*, 463 Mich 1, 6; 615 NW2d 17 (2000). The record shows that defendant was not formed until October 22, 2010, more than a year after Mix's accident. Defendant provided the testimony of its president, who testified that the company was formed with the intention of creating a new medical facility in Southfield, but that project fell through. As such, defendant was never operational. Plaintiff did not provide any documentation showing that defendant owned, or provided services to, the facility where Mix was a resident, and there was no evidence that defendant was involved in Mix's care. Based on the record, defendant did not owe a duty to Mix, and therefore, the trial court did not err by dismissing defendant from the case.

Next, we address whether the trial court should have allowed plaintiff to amend her complaint to add Irvine Head Injury Homes, Inc. MCR 2.118(A)(2) provides, "Except as provided in subrule (A)(1), a party may amend a pleading only by leave of the court or by written consent of the adverse party. Leave shall be freely given when justice so requires." "However, leave to amend a complaint may be denied for particularized reasons, such as undue delay, bad faith, or dilatory motive on the movant's part, repeated failure to cure deficiencies by

amendment previously allowed, undue prejudice to the opposing party, or where the amendment would be futile." *Hakari v Ski Brule, Inc.*, 230 Mich App 352, 355; 584 NW2d 345 (1998).

In this case, the trial court denied plaintiff's motion to amend her complaint to add Irvine Head Injury Homes, Inc. as a defendant because her claims for medical malpractice and negligence against the prospective defendant were time-barred, and thus, the amendment would be futile. Plaintiff cites MCR 2.205 for purposes of characterizing Irvine Head Injury Homes, Inc. as a necessary party who may be added to the action even though the statute of limitations expired. MCR 2.205 provides that "persons having such interests in the subject matter of an action that their presence in the action is essential to permit the court to render complete relief must be made parties and aligned as plaintiffs or defendants in accordance with their respective interests." This rule clearly is meant for the joinder of additional parties to litigation that is already in progress. In this case, Irvine Head Injury Homes, Inc. would be the only defendant because the evidence is clear that defendant was properly dismissed from the action. Therefore, this rule would not apply here.

Additionally, the service of process on defendant was insufficient to toll the statute of limitations as to the prospective defendant, Irvine Head Injury Homes, Inc. An amendment seeking to add a new party may relate back to the date of the original pleading only if the amendment is to correct a misnomer in the party's name. *Miller v Chapman Contracting*, 477 Mich 102, 106; 730 NW2d 462 (2007). "The misnomer doctrine applies only to correct inconsequential deficiencies or technicalities in the naming of parties, for example, '[w]here the right corporation has been sued by the wrong name, and service has been made upon the right party, although by a wrong name . . . '" *Id.* at 107, quoting *Wells v Detroit News, Inc.*, 360 Mich 634, 641; 104 NW2d 767 (1960) (citation and quotation marks omitted). The misnomer doctrine generally applies to correct a misspelling or to amend a designation, such as changing "corporation" to "partnership." See *Miller*, 477 Mich at 106, citing *Detroit Indep Sprinkler Co v Plywood Prod Corp*, 311 Mich 226, 232; 18 NW2d 387 (1945); *Stever v Brown*, 119 Mich 196; 77 NW 704 (1899). It does not apply where "the plaintiff seeks to substitute or add a wholly new and different party to the proceedings." *Miller*, 477 Mich at 106.

We have identified several factors to determine whether the misnomer doctrine applies, including:

> (1) whether service was had upon one who was a proper representative of both corporations; (2) whether the corporations share the same legal address; (3) whether the corporations are in the same general business; (4) whether the corporations have most of the same officers; (5) whether the corporations are represented by the same law firm; and (6) whether the officers of the corporations which plaintiff is seeking to add were clearly informed of facts which would indicate which entity plaintiff intended to sue. [*Cobb v Mid-Continent Tel Serv Corp*, 90 Mich App 349, 354; 282 NW2d 317 (1979), citing *Wells* 360 Mich at 639.]

"Furthermore, courts generally have also considered the extent of plaintiff's fault in bringing an action against the wrong entity." *Cobb*, 90 Mich App at 354.

We recognize that some confusion could arise with the various Irvine-related facilities. There are at least four facilities, including the one that Mix was a resident of, that appear to be part of the "Irvine Neuro Rehabilitation Center," which is different from defendant. These facilities, however, do have the same resident agent and mailing address as defendant, so it was not unreasonable for plaintiff to list Irvine Neuro Rehabilitation, L.L.C. as the original defendant in this case. However, plaintiff may not use the misnomer doctrine as a shield, when her lack of due diligence resulted in the untimely amendment. Plaintiff was on notice from the start of the case that defendant was not the proper entity to sue and failed to act. If plaintiff had searched the state records when she first learned in October 2011 that defendant was not in existence at the time of the accident, the records would have revealed that, besides defendant, the only other entity with the Irvine name was Irvine Head Injury Homes, Inc. In fact, the record indicates that Irvine Head Injury Homes, Inc. operated the home that Mix was a resident of. Had plaintiff immediately done her due diligence, she would have discovered the existence of Irvine Head Injury Homes, Inc., and could have sought leave to add it as a defendant at that time, rather than waiting over a year after commencing the action and after the statute of limitations had expired. Therefore, it was not an abuse of discretion for the trial court to deny plaintiff leave to amend her complaint, when she caused undue delay and repeatedly failed to cure the deficiency.

Affirmed. Defendant, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Mark J. Cavanagh
/s/ Donald S. Owens
/s/ Michael J. Kelly